IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969
No. 1418

ARTHUR VASQUEZ,

Petitioner,

vs.

PEOPLE OF THE
STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

NORMAN J. KAPLAN
205 South Broadway
Suite 1000
Los Angeles, California 90012
(213) 625-1424

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969
No. ____

ARTHUR VASQUEZ,

Petitioner,

vs.

PEOPLE OF THE
STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

NORMAN J. KAPLAN
205 South Broadway
Suite 1000
Los Angeles, California 90012
(213) 625-1424

Attorney for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF CASE	4
How the Federal Question is Presented	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16
OPINION OF THE COURT OF APPEAL	A-1

TABLE OF AUTHORITIES

Cases	Page
Ker v. California, 374 U.S. 23	8, 11, 13
Mapp v. Ohio, 367 U.S. 643	15
Miller v. United States, 357 U.S. 301	7, 13
People v. DeSantiago, 71 A.C. 19, 76 Cal. Rptr. 809	11, 12
People v. Gastelo, 67 Cal. 2d 586, 63 Cal. Rptr. 10	11, 12, 14
People v. Maddox, 46 Cal. 2d 301	10, 11
People v. Manriquez, 231 Cal. App. 2d 725, 42 Cal. Rptr. 157	10, 11, 12
People v. Rosales, 68 Cal. 2d 299, 66 Cal. Rptr. 1	14
Wong Sun v. United States, 371 U.S. 471	7, 13

Statutes

California Health and Safety Code,
Section 11500.5 4

California Penal Code,
Section 844 8, 9

California Penal Code,
Section 1531 8, 9

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969
No. ____

ARTHUR VASQUEZ,

Petitioner,

vs.

PEOPLE OF THE
STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Second Appellate District, Second Division, State of California, entered in the above-entitled case on November 18, 1969.

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, Second Division, State of California, printed in the Appendix hereto is reported in 1 Cal. App. 3d 769, 82 Cal. Rptr. 131 (1969).

JURISDICTION

The judgment of the Court of Appeal, Second Appellate District, Second Division, State of California, was entered on November 18, 1969 (Appendix). A timely petition for rehearing was filed on December 2, 1969 and was denied on December 10, 1969. A petition for hearing by the Supreme Court of California was filed on December 29, 1969 and was denied on January 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I

Whether evidence seized in a search of a dwelling is constitutionally admissible under the Fourth Amendment "Exclusionary Rule," when police rushed the open door of an apartment, and without notice of purpose or request for admission, and without factual circumstances to indicate possible destruction of evidence or danger to the police, pulled open the door and pushed the resident inward.

II

Whether the shift in the burden of proof (from police officers proving their method of entry and search is constitutionally reasonable to the apartment dweller proving that it is unreasonable) resulting from the Court of Appeal's "substantial compliance" standard, is consistent with Fourth Amendment protections of privacy and sanctity of the home.

STATEMENT OF CASE

On December 7, 1967 Arthur Vasquez, Appellant herein, was found guilty of a violation of the California Health and Safety Code, section 11500.5, Possession for Sale of a Narcotic, Not Marijuana, and on January 31, 1968, was sentenced "to the State Penitentiary for a term prescribed by law." (R.T. 53, C.T. 64, 66). A motion for a new trial was argued and denied on January 3, 1968. The prior convictions were found by the trial court to be not true. Appellant then made a timely appeal to the Court of Appeal, Second Appellant District, Second Division. On November 18, 1969 the Court of Appeal affirmed the decision of the trial court. A petition for rehearing was denied on December 19, 1969 and a Petition for Hearing by the Supreme Court of California was denied on January 14, 1970.

Appellant's arrest and conviction by the trial court and the affirmation on appeal were based solely on evidence discovered by police officers during a search of an apartment. The police gained entry by rushing the slowly closing glass door of the apartment (R.T. 33, 34), and then pushing Appellant back out of the doorway (C.T. 12-13). The officers then served a search warrant and proceeded to search the apartment. The officers found an unlit, partially smoked marijuana cigarette, an empty brown paper bag which smelled of acetic acid, and six

condoms of heroin (C.T. 15-17). The cigarette and brown paper bag were both clearly visible and found shortly upon entry in to the apartment (C.T. 15-17).

After a forty-five minute search, the heroin was found in the back portion of the apartment's air conditioning unit (C.T. 17). The introduction of these items at the trial was the sole basis for the court's finding of guilt.

The search warrant was executed in the following manner: On October 29, 1966 two Los Angeles City policemen, Officer Ridenour and Sergeant Leeds, went to 2706 Maxon Road, in El Monte, California with a search warrant. The officers went directly to the apartment of the building's co-manager, Mrs. Charles Van Buren. The officers asked the manager questions about the residents of apartments 4 and 14 (C.T. 4-5). They then asked Mrs. Van Buren to ascertain whether vehicles belonging to the Appellant were in the apartment's car port (C.T. 5). The manager found the Appellant's automobile improperly occupying two spaces instead of the single space allotted to Apartment 14. The manager then proceeded to Apartment 14 to request movement of the car (R.T. 26-27; C.T. 6). The two police officers moved to a position to be out of sight of Apartment 14 occupants, eight to ten feet from the apartment door (C.T. 6, 22; R.T. 27-28).

The manager knocked at the door of Apartment 14 and Appellant immediately responded, "Who is it?" Mrs. Van Buren replied "manager," Appellant pulled back the curtains covering the glass door and opened the door to talk with the manager (C.T. 6; R.T. 32-33). The Appellant then told the manager he would move the car (R.T. 33) and that he had to get the keys (C.T. 36). At that moment, as the Appellant started closing the door, the policemen rushed from their hiding place, grabbed the slowly closing door, pushed Appellant back, and forced their way into the apartment (C.T. 7, 8, 28-29). As Officer Ridenour testified, the officers "went right through the door and kind of shoved him real quick." (C.T. 29).

As the police moved toward the door, Appellant continued to slowly close it. Appellant did not attempt to slam the door (R.T. 34) even though he may have looked in the direction to the officers (C.T. 7). As the police rushed toward the door, the only words spoken in that ten-second period (C.T. 28-29) were "Police officers." (C.T. 8-9). One of the officers showed his badge as he rushed the door (C.T. 6-8). It was after the officers had been inside the apartment a few minutes that the purpose of the entry was indicated by the physical conveying of the search warrant to the Appellant (C.T. 13-14, 31).

Officer Ridenour testified that their method of entry and execution of the search warrant was compelled by the fear that

BLEED THROUGH POOR COPY

Appellant would lock the door to destroy the narcotics and by the feeling that his physical safety would be endangered (C.T. 11; R.T. 35). The officer later testified that on the day he entered the apartment, he had no specific knowledge or information that there were narcotics in Apartment 14 (C.T. 34-35). Further, both Officer Ridenour and the manager, Mrs. Van Buren, testified that at no time was the appellant observed to have any weapons (C.T. 33; R.T. 34). The officers were able to observe the Appellant during his entire conversation with the manager (C.T. 6-8, 22).

How the Federal Question is Presented

The Federal question herein was first raised before the trial court. The arguments of unreasonable method of entry by police officers, the illegality of the search, and the inadmissibility of the evidence, were brought to the attention of the trial court through proper and timely objections (C.T. 9-11, 40-41). In both Appellant's Opening Brief on Appeal and the Reply Brief, the Federal issue was again raised through Wong Sun v. United States, 371 U.S. 471 (1963) and Miller v. United States, 357 U.S. 301 (1958). And in Appellant's Petition for Rehearing to the Court of Appeal and the Petition for Hearing in the Supreme Court of California, the Federal issue was asserted again.

The Court of Appeal held that in light of the "exigent" circumstances, the entry and

and search were not unreasonable.

REASONS FOR GRANTING THE WRIT

In Ker v. California, 374 U.S. 23 (1963), the Court discussed the specific federal question raised by this petition. The right of the States to develop their own workable rules governing searches and seizures was affirmed, with an admonishment against a flexibility generated by expediency which would permit unreasonable searches (Ker at 34). In the seven years since the Ker decision, the Court has not had an appropriate opportunity to examine the evolution of California's statutory and judicial standards in light of the Fourth Amendment's broad requirements for reasonable searches and seizures.

The facts presented by this case are uniquely suited for a constitutional clarification of California's application of its "Knock and Notice" statute, California Penal Code Section 1531 [Cal. Pen. C. 1531 and 844 are set in context here for the Court's convenience:]

> Sec. 1531 EXECUTION, AUTHORITY TO BREAK IN AFTER ADMITTANCE REFUSED
>
> Officer may break open door, etc. to execute warrant. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute

BLEED THROUGH POOR COPY

the warrant, if, after notice of his authority and purpose, he is refused admittance.

Sec. 844 BREAKING OPEN DOOR OR WINDOW TO EFFECT ARREST; DEMAND FOR ADMITTANCE; EXPLANATION OF PURPOSE

To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

The Court of Appeal in affirming the conviction of the Appellant, based the opinion on a theory of "substantial compliance" with section 1531, as distinguished from "non-compliance, with excusing exceptions." Section 1531 requires: 1) notice of authority, 2) notice of purpose, and 3) refusal of admittance. The facts in the case at bar show that no statement of purpose was made prior to entry (C.T. 8-9), and other than the fact that Appellant was "shoved" (C.T. 29) out of the doorway as the Police pushed open the sliding door, there was no evidence of any conscious or overt refusal of admittance. Thus, two of the three requirements of section 1531 were not complied with. This is surely "non-compliance." The Court of Appeal, however, held that the action of the Police was "substantial

compliance."

By reversing the emphasis from "exceptions excusing non-compliance" to "substantial compliance," the Court of Appeal is destroying the Fourth Amendment presumption of inviolability of a dwelling and replacing that constitutional mandate with an antithetical theory which shifts the burden of proof to the apartment dweller. The result of the Court of Appeal decision is to first, compel the dweller to prove that the police did not comply with the statute, and second, if he succeeds in carrying this burden of proof, he then must prove that the elements of the common law excuses for non-compliance are not present. By a subtle inversion, which at first glance seems only terminological, the Court of Appeal has given law enforcement officers the right to flaunt both constitutional and statutory standards for search and seizure, by cavalierly shifting the burden of proof to the once-protected building dwellers.

Although the precedential basis for the Court of Appeal decision is not clear, reference is made to California decisions which have been severely limited by recent California Supreme Court cases. It appears that the Court of Appeals in the case at bar is relying upon a principle attributed to People v. Maddox, 46 Cal. 2d 301, 306 (1956) and expressly stated in People v. Manriquez, 231 Cal. App. 2d 725, 42 Cal. Rptr. 157 (1965):

> The rule requiring warning is statutory and not constitutional; it may and should yield to the practical necessities of reasonable law enforcement activity.

In Ker the Court upheld the general principles stated in Maddox, but the emphasis was on "reasonable law enforcement" rather than "practical necessities." Ker at 34. The trend in California has run consistently away from the Maddox-Manriquez notions of expediency-oriented search and seizure standards. People v. Gastelo, 67 Cal. 2d 586, 63 Cal. Rptr. 10 (1967), and People v. DeSantiago, 71 A.C. 19, 76 Cal. Rptr. 809 (1969). In Gastelo, Justice Traynor, speaking for the court, recognized the inherent constitutional nature of the search and seizure question as it is related to the requirements of Cal. Pen. C. Sec. 1531:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard -- the requirement of particular reason to enter at all, so must they have some particular reason to enter in the manner chosen. To the extent that People v.

> Manriquez . . . . [is] contrary to our conclusion herein, [it is] disapproved. Gastelo, at 588-89.

The factual posture of this case graphically displays the environment of permissive and irresponsible law enforcement that may be perpetuated by leaving the opinion of the Court of Appeal untouched. It is necessary for the Court here to examine the record in this case, applying the proper constitutional standards of Gastelo, (ie. requiring excusing common law exceptions to justify non-compliance) rather than the "substantial compliance" standard of the Court of Appeal. Gastelo summarized the exceptions to compliance that have been engraffed upon Cal. Pen. C. sections 1531 and 844. Non-compliance may be excused if compliance would 1) increase peril to officers, 2) frustrate arrest, or 3) permit evidence to be destroyed. (Gastelo, at 587). Exceptions (1) and (3) are directly relevant to the case at bar.

Fear of Destruction of Evidence -- as stated in Gastelo, 67 Cal. 2d at 589, the "asserted general propensity of narcotics violators to destroy evidence" does not "justify officers' failure to comply with section 1531." Only "where officers have obtained particular information which leads them to reasonably conclude that the occupants . . . have specifically resolved to effect disposal in the event of police intrusion or have made specific preparations in that regard." (People v. DeSantiago, 71 A.C. at 29). In the case at bar the only "particular" evidence of a "specific

preparation" to destroy evidence came from an ambiguous prior meeting between Officer Ridenour and the Appellant. Apparently Officer Ridenour had arrested the Appellant on a previous occasion and had not found any narcotics. Appellant allegedly responded to the Officer's lack of success, with a statement that "if he [Appellant] had narcotics in the house he would have gotten rid of it." (C.T. 11). This statement attributed to the Appellant at some indefinite time in the past, was the sole basis for officers' belief that evidence would be destroyed.

In addition, there were no other particular circumstances that would give the officers cause to fear destruction of evidence. Appellant quickly opened the door upon the manager's knock. The mere closing of a door is not sufficient cause to forcibly enter. Miller v. United States, 357 U.S. 301, 311 (1958). Even though that case dealt with the requirements of a Federal Statute, the Court recognized that both state and federal jurisdictions have a "mutual obligation to respect the same fundamental criteria in their approaches." (Ker, 374 U.S. at 31). Even if the Appellant had attempted to slam the door overtly (R.T. 34), the ambiguity of the conduct would still be present. Wong Sun v. United States, 371 U.S. 481, 482, (1963).

The Court of Appeal also implied that Appellant's previous contact with Officer Ridenour allowed recognition of the officer as he began to move toward the door. This is a particularly difficult proposition to maintain

since the record is not clear as to whether Appellant even saw the figures running toward him, until they forced their way through the door. Assuming arguendo, that Appellant did, in fact see the officers approaching, and assuming further that the Appellant recognized Officer Ridenour, it is peculiar that Appellant made no furtive movements to repel the officers' entry. Taking these facts into consideration, there were no circumstances that gave the officers reason to effect entry in the manner chosen on this occasion.

Physical Danger to Officers -- The only "particular" event surrounding the non-compliance that could have provided the officers with a fear of physical danger, was Officer Ridenour's confiscation of a shotgun from Appellant, three to four months before the entry here in question. There was no testimony that Appellant had ever used a gun or that he had recently purchased one. Since the officers saw no weapon, while observing the Appellant from the time he opened the apartment door to the time he began to shut it, there was not a reasonable basis for the officers to fear for their safety. The California Supreme Court expressly extended the Gastelo holding to cover physical resistance in addition to destruction of evidence: Non-compliance "cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape or destroy evidence." People v. Rosales, 68 Cal. 2d 299, 305, 66 Cal. Rptr. 1, (1968).

BLEED THROUGH POOR COPY

Thus, the common law exceptions for non-compliance are not applicable on the facts of this case. There was no specific information that Appellant had narcotics in his apartment on the day of the entry (C.T. 34-35); there was no furtive movements made by the Appellant and no specific, present, circumstance which would induce reasonable fear of physical harm. The admission of evidence obtained by this search and the conviction which it supported, cannot be tolerated in light of the Fourth Amendment standards set down by this Court, as applied to the States through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 657 (1960).

The impact of the Court of Appeal decision is devastating, considering the inordinate amount of time and money which must be spent on appeal through the California Appellate System. The Court must not permit the burden-shifting standard of "substantial compliance" rather than "non-compliance, excused by exceptions" to be upheld for the future application of the California Trial Courts. The inherent unconstitutionality of the "substantial compliance" standard, as applied by the California Court of Appeal, can not be more clearly demonstrated than by the factual setting presented in this case.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN J. KAPLAN

Attorney for Petitioner

APPENDIX A

[Opinion of the Court of Appeal, Second Appellate District, State of California, Division Two, Filed November 18, 1969, Clay Robbins, Jr., Clerk]

2d Crim. No. 15502

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ARTHUR VASQUEZ,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Carlos M. Teran, Judge. Affirmed.

Norman J. Kaplan for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Michael L. Abrams, Deputy Attorney General, for Plaintiff and Respondent.

The determinative question on this appeal from the judgment convicting appellant of possession of heroin for purposes of sale is whether the seizure of the large supply of heroin which the arresting officers found in appellant's apartment was accomplished legally. In holding that this question must be answered affirmatively, we reject appellant's contention that the seizure should be held illegal because of the asserted failure of the officers, acting pursuant to the authority of a valid search warrant, to comply literally with the requirements of section 1531 of the Penal Code.[1/]

Summary of the Evidence

At approximately 3 p.m. on October 29, 1966, Officers Ridenour and Leeds of the Narcotics Division of the Los Angeles Police Department went to the location of an apartment

---

1/ Section 1531 of the Penal Code, frequently referred to as the "counterpart" of section 844 of the same code, provides:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

FILTER THROUGH POOR COPY

house described in the search warrant which they intended to execute. This warrant, the validity of which is unquestioned, was issued upon the basis of a reliable informant's sufficiently corroborated reports to Officer Ridenour that appellant Arthur Vasquez was dealing in large quantities of heroin and that he had sold heroin to the informant at apartment 14 of the described apartment house.

On arriving at the apartment house the two officers contacted Mrs. Van Buren, the apartment house manager. Officer Ridenour testified that he asked Mrs. Van Buren to check the parking lot to see if there were any vehicles there associated with Vasquez. She returned and said, "Yes," and said she was going to have Vasquez move the car. When she knocked on the door of apartment 14 appellant Vasquez asked, "Who is it?" She replied, "Manager," whereupon Vasquez pulled back the drapes, looked out and then opened the sliding glass door. The two policemen were standing in the doorway, which was between the parking area and the apartment house courtyard. They were approximately 8 to 10 feet from the sliding glass door of apartment 14.

Mrs. Van Buren asked Vasquez to move his car. At that time the two policemen moved toward the sliding glass door. Sergeant Leeds had his badge in his hand and announced "Police officers." This occurred when the two officers were approximately 5 feet from Vasquez, outside his door. At that point

Vasquez attempted to slide the glass door shut but the two officers moved forward, prevented him from closing the door and entered the apartment.

Whether the officers were in uniform or not does not appear, but the statement is made in the testimony that Officer Ridenour had his hand on his weapon, which was not drawn. And Mrs. Van Buren made the statement that Officer Ridenour had his hand on his gun but she did not think he had it out. In another part of the testimony reference is made to the gun holster.

Mrs. Van Buren testified that when the officers came to the apartment house they told her they would like to go into apartment 14 but that they didn't want to break in the door. She then said, "I didn't want them to. . . . I told them I would get the door open for them. . . ." She went to the carport area and found Vasquez's car improperly parked. She then went to apartment 14 and asked Vasquez to move the car. She also testified that before Officer Leeds entered Vasquez's apartment he displayed his badge and stated that he was a policeman.

To show the evidentiary refutation of appellant's assertion that Mrs. Van Buren's cooperation with the officers was coerced, we quote the following portion of her testimony: "Q. Did the officers ever request you specifically to get Mr. Vasquez out of the apartment? A. Asked me to get him out? Q. Yes.

BLEED THROUGH, POOR COPY

A. Not that I know of. I know they wanted to go in the apartment. Q. But they never asked you to -- A. Not that I know of. I can't recall. Q. You volunteered to get the door open? A. Yes, I did. I volunteered myself. . . . Q. Just a couple more questions, Mrs. Van Buren. Actually, you volunteered because you didn't want any door broken down, isn't that correct? A. Yes, and I was trying to help the law. Q. They wanted to gain entry into the apartment. You suggested that you get Mr. Vasquez to come out, open the door so they wouldn't have to break it in? A. Yes." (Emphasis added.)

The following from the testimony of Officer Ridenour given in response to questions put to him by the Deputy District Attorney is quoted because of its significance in showing the presence of the exigent circumstances which justified the officers' entry in the manner indicated by the evidence to the extent that there was any lack of literal compliance with the requirements of section 1531:

"BY MRS. HAM: Q. Was there any particular reason why you made entry in the manner you did at that particular time with a search warrant? A. Yes. Q. Could you tell us why? . . . A. One reason it was effected in this manner was the fact that the contraband that we were going to apprehend was narcotics named in the search warrant, narcotics being an easy item to dispose of; and we did it in this manner in fear that if we did not that contraband would be destroyed.

Another reason was that on a prior occasion I had effected an arrest on Arthur Vasquez, and at this time he stated that if he had narcotics in the house he would have gotten rid of it. Also, on a prior arrest, I had knowledge -- which I saw for myself -- I saw a shotgun in Mr. Vasquez' home, which he stated he owned, and also I knew of a rifle.[2/] Also entered in this manner because we had stated, 'Police officers.' My partner had a badge in his hand, which I saw; and at this time as we was moving toward the door, the door started to close, and if -- I felt that if we did not enter in this manner by going through an open door, the door would be closed and locked and contraband would be destroyed."

Substantial Compliance With Section 1531

In the recent decision of our Supreme Court in Greven v. Superior Court, 71 A.C. 303, we find a complete exposition of the purpose, meaning and effect of sections 844 and 1531 of the Penal Code. In the same decision there is a painstaking analysis of precedents dealing with the question whether there was substantial and sufficient compliance with the requirements of those sections in a variety of factual situations.

2/ The evidence indicates that Officer Ridenour had arrested Vasquez in a different residence two or three months before the date of the arrest in this case.

Among the earlier decisions referred to in Greven as cases in which the Supreme Court "has upheld [entries] which did not strictly comport with statutory requirements" but which were effected in a manner constituting "substantial compliance" are the following: People v. Marshall, 69 Cal. 2d 51, 55-56; People v. Cockrell, 63 Cal. 2d 659, 665-666; People v. Carswell, 51 Cal. 2d 602, 607; and People v. Martin, 45 Cal. 2d 755, 762-763.

In distinguishing the cited cases from the case then at hand, the Supreme Court used the following language (71 A.C. at pp. 307-308):

"[I]t is true that in the cited cases this court has held that the requirements of section 844 were satisfied by 'substantial compliance' which fell short of strict literal compliance. In each of these cases, however, the officers prior to entry not only gave notice of their presence through knocking or some other means but also identified themselves as police officers. It was the second requirement of section 844, to wit, that the officers explain 'the purpose for which admittance was desired,' which we undertook to apply in light of the facts and circumstances of the case in order to determine whether 'substantial compliance' had been achieved in the absence of an express announcement of purpose. In People v. Rosales, supra, 68 Cal. 2d 299, at page 302, we recently restated the rationale of these cases: 'Such identification [i.e., identification as police officers without an express announcement of purpose] alone could constitute substantial compliance with

section 844 only if the surrounding circumstances made the officers' purpose clear to the occupants or showed that a demand for admittance would be futile.'"

It will be noted that twice in the foregoing quotation the Supreme Court refers to "identification" alone, without any mention of the future necessity of demand for admittance, as being sufficient to constitute substantial compliance where the officers' purpose is otherwise made clear. In People v. Cockrell, supra, 63 Cal. 2d 659, 666, the court said: "Since it appeared that a sale of marijuana had been made in the Cockrells' home only minutes before the officers requested admittance, 'the purpose for which admittance' was 'desired' was reasonably apparent."

In People v. Carswell, supra, 51 Cal. 2d 602, the officers had "knocked and announced that they were police officers but received no reply." Apparently no demand for admittance was made but the ensuing entry was held not in violation of section 844.

Furthermore, and quite apart from the fact that the officers did not forcibly open the door but merely prevented the open door from being closed, the officers in the case at bench had announced their identity and appellant's immediate response in attempting to close the door rendered futile any effort on the part of the officers to effect a strict and literal compliance with section 1531. (Cf. People v. Rosales, 68 Cal. 2d 299, 302; People v.

FILTER THROUGH POOR COPY

Lopez, 269 A.C.A. 543, 550; and People v. Limon, 255 Cal. App. 2d 519, 522.

In view of appellant's contact with Officer Ridenour on the occasion of his previous arrest, and in view of appellant's possession of some $30,000 worth of heroin, it is obvious that there was abundant evidentiary basis for the trial court's implied finding that when appellant attempted to close the door, he not only knew the officers' identity but was well aware of the officers' purpose in seeking to gain entry into his apartment.

When the law, as stated in Greven v. Superior Court, supra, and in the precedents which that decision approves, is applied to the facts here presented, the conclusion is unavoidable that the requirements of substantial compliance were fully met in this case.

Exigent Circumstances Justifying Lack of Literal Compliance

We agree with the trial court and with the argument of respondent that the record in this case establishes the presence of exigent circumstances more than sufficient to excuse any lack of literal compliance with the statutory provision under discussion. These circumstances include: (1) the fact that only three or four months previously Officer Ridenour had arrested appellant in his residence and found him in possession of a shotgun and a rifle; (2) the fact that at the time of this prior arrest appellant told the officer "that if he had

narcotics in the house he would have gotten rid of it;" and (3) the fact that when the officer announced "police officers" and displayed his badge, appellant attempted to close the door.

In People v. Newell, 272 A.C.A. 728, 733, a case presenting a similar factual situation, we invoked the rule stated in People v. De Santiago, 71 A.C. 18, 29, that "where officers have obtained particular information which leads them to reasonably conclude that the occupants of an apartment or residence have specifically resolved to effect disposal in the event of police intrusion or have made specific preparations in that regard . . . an unannounced entry may be justified." The application of the foregoing rule to the facts of the instant case is self-evident.

Another case in which we dealt with the same issue in a similar factual setting is People v. Lopez, supra, 269 A.C.A. 543, and at page 548 we cited a long line of decisions holding that ruse or stratagem may properly be used by officers to gain entry in order to effect a lawful arrest. In this case, however, it is unnecessary to invoke this settled rule because here the officers' procedure did not involve any employment of ruse or stratagem. The conduct of the officers in the present case as described by Officer Ridenour and as described in the corroborating testimony of Mrs. Van Buren was unassailable and subject to no valid criticism.

FILED THROUGH POOR COPY

The following discussion of applicable precedents is found in People v. De Santiago, supra, 71 A.C. at pages 24-25:

"In 1956 we held in the leading case of People v. Maddox (1956) 46 Cal. 2d 301 [294 P. 2d 6], that the requirements of section 844 are 'limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose.' (46 Cal. 2d at p. 306.) In that case police officers, having probable cause to believe that the defendant was selling narcotics, went to his residence and knocked on the door. One of the officers heard a male voice say 'Wait a minute' and also heard the sound of retreating footsteps. He kicked the door open and apprehended the defendant. On the basis of these circumstances we concluded that 'When, as in this case, [the officer] has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable.' (46 Cal. 2d at p. 306.)

"Subsequent pre-Gastelo decisions of this Court which applied the so-called 'Maddox exceptions' invariably involved specific factual elements comparable to the 'retreating footsteps' in Maddox -- that is, circumstances peculiar to the entry in question by which the officers could reasonably conclude that announcement would increase their own peril or frustrate the arrest.

We summarized some of these decisions in Gastelo as follows: '. . . in People v. Carillo (1966) 64 Cal.2d 387 [50 Cal.Rptr. 185, 412 P.2d 377], entry followed a knock and observation of suspicious movements. In People v. Smith (1966) 63 Cal.2d 779 [48 Cal.Rptr. 382, 409 P.2d 222], and People v. Gilbert (1965) 63 Cal.2d 690 [47 Cal.Rptr. 909, 408 P.2d 365], the officers were in fresh pursuit of gun-wielding defendants. Similarly, in People v. Hammond, (1960) 54 Cal.2d 846 [9 Cal.Rptr. 233, 357 P.2d 289], officers had cause to believe defendant had a gun and was under the influence of heroin at the time of arrest.' (People v. Gastelo, supra, 67 Cal. 2d at p. 588."

In view of the rules enunciated in the several decisions summarized in the foregoing quotation from De Santiago, it must be concluded that the circumstances of the instant case provided unusually strong legal support for the conduct of the police officers in executing the search warrant and for the ruling of the trial court which we now approve.

Appellant's statement to Officer Ridenour on the occasion of his previous arrest to the effect that "if he had narcotics in the house he would have gotten rid of it" constituted a reasonable basis for the officers' belief that appellant had "specifically resolved to effect disposal in the event of police intrusion." The fact that appellant was armed with a shotgun and a rifle at the time of his prior arrest some three months previously clearly constituted

BLEED THROUGH POOR COPY

justification for the officers' apprehension that appellant, a known dealer in narcotics, might have rearmed himself with another dangerous weapon. And appellant's conduct in attempting to close the door when he observed the approach of the officers was reasonably interpreted by the officers and by the trial court as a furtive act constituting the first step in a preconceived plan to dispose of the contraband with the effect of thwarting the lawful purpose of the search warrant.

Sufficiency of the Evidence of Possession

Appellant has advanced the secondary contention that "a conviction of possession of narcotics cannot be sustained where the state has shown only that narcotics were found in an apartment occupied by the appellant to which other people had easy access."

It is well settled, of course, that in a prosecution for unlawful possession of narcotics, it is incumbent upon the prosecution to present evidence from which the trier of the facts reasonably may infer and find that the accused had dominion and control over the contraband with knowledge of its presence and narcotic character. Mere proof of opportunity of access to a place where narcotics are found will not support a finding of unlawful possession. (People v. Redrick, 55 Cal.2d 282, 285.)

It is equally well settled, however, that each of these essential elements may be proved by circumstantial evidence; that furtive

action or other suspicious conduct on the part of the accused may be sufficient; that exclusive possession of the premises in which the contraband was found need not be proved; and that immediate physical possession is not of the essence. The law controlling this aspect of the instant case is well stated in People v. Hutchinson, 71 A.C. 360, a case in which the appellant had been convicted of the possession of marijuana.

In rejecting the same contention as that now advanced by appellant in the case at bench, the Supreme Court used the following language at page 363: "The evidence was sufficient to support the verdict. 'Unlawful possession of narcotics is established by proof (1) that the accused exercised dominion and control over the contraband, (2) that he had knowledge of its presence, and (3) that the accused had knowledge that the material was a narcotic.' (People v. Groom (1964) 60 Cal.2d 694, 696 [36 Cal.Rptr. 327, 388 P.2d 359].) When contraband is found in a place to which a defendant and others have access and over which none has exclusive control 'no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic. . . .' (People v. Redrick (1961) 55 Cal.2d 282, 287 [10 Cal.Rptr. 823, 359 P. 2d 255].)"

In Hutchinson the court further observed that if the evidence in that case had shown only that two boxes containing marijuana were found hidden under a bed in a bedroom shared by

defendant and his three brothers and to which other guests also had access, the applicable rule would be that "proof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession." (Citing People v. Redrick, supra.) But, said the court, there was in that case the additional evidence that defendant had fled from his home when his mother confronted him with the marijuana, demanded an explanation and threatened to call the police.

As we shall show, the "congeries of facts" established by the evidence in the instant case was even stronger and constituted more than sufficient circumstantial evidence of appellant's possession of the contraband. His familiarity with narcotics may be inferred from his statement to Officer Ridenour at the time of his previous arrest.

As has been recited, the officers entered apartment 14 despite appellant's attempt to close the door in their faces. As Sergeant Leeds entered, appellant faced him with his arms extended forward but the officer "pushed him" whereupon "he took a couple of steps backward and then sat down on the couch." There was another man present in the apartment who arose from a davenport and started to run toward the kitchen before he was restrained.

After explaining that he had a search warrant and after handing appellant a copy of the warrant, the officers proceeded to search

the apartment. The found in a waste paper basket a brown paper bag which gave off the odor of acetic acid, a substance used in the preparation of heroin. On an end table adjacent to the divan in the living room they found a roach an inch and a quarter in length containing marijuana. Behind the screen of an air conditioner in the living room they found condoms containing 187 grams of heroin referred to as having a value of $30,000.

Mrs. Van Buren, the apartment house manager, testified that she first rented apartment No. 4 to appellant and that shortly thereafter she rented apartment No. 14 to one Robert Burnell who paid the monthly rent only for the first month. Both appellant and Burnell moved in and occupied apartment 14. However, except for the first month, appellant made each monthly rent payment thereafter for a matter of months prior to October 29, 1966, the date of the search and seizure involved in this case.

It appears from Mrs. Van Buren's testimony that after appellant began paying the rent on apartment 14, he occupied and used it but that he also continued to pay the rent on apartment No. 4 which he shared with his sister. It is reasonably clear from the testimony that from the time appellant began paying the rent and receiving the rent receipts and for a period of at least two months prior to October 29, 1966, he was the tenant in possession and control of apartment 14.

BLEED THROUGH POOR COPY

The presence in the apartment of the large supply of heroin and the recent use of acetic acid as evidenced by the brown paper bag found in the waste basket combine to support the reasonable inference that heroin was being processed in the apartment. The fact that appellant had frequent visitors is not inconsistent with the theory that he was engaged in the business of processing and selling heroin.

In the nature of things it would appear most improbable that anyone other than a tenant in possession would hide $30,000 worth of heroin in an air conditioner of a residential apartment. It seems inconceivable and contrary to every dictate of reason to suppose that a possessor of such a quantity of heroin other than appellant would have concealed it in appellant's apartment without his knowledge.

Added to the probabilities and improbabilities inherent in all these circumstances is the evidence of appellant's furtive conduct in attempting to block the officers' entry into the apartment.

The judgment is affirmed.

HERNDON, J.

We concur:

ROTH, P. J.

FLEMING, J.